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Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

April 26, 2016 Government Records Council Meeting

King Victorious
Complainant

Complaint No. 2014-334

v.

NJ Department of Corrections
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council ("Council") considered the March 22, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that based on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. The complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna v. NJ Dep't of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015).

Interim Order Rendered by the
Government Records Council
On The 26th Day of April, 2016

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 28, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 26, 2016 Council Meeting**

**King Victorious¹
Complainant**

GRC Complaint No. 2014-334

v.

**NJ Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: “Pursuant to N.J.A.C. 10A:18-2.6(h), my name is on the authorized list which states that all my incoming correspondence is authorized to be read and maintained in the correctional facility’s Special Investigation Division or mail room . . . I am requesting . . . [c]opies of the ‘Envelopes’ of all my incoming correspondence that was authorize [sic] to be read from August 20, 2012 through July 23, 2014.”

Custodian of Records: John Falvey

Request Received by Custodian: September 18, 2014

Response Made by Custodian: September 19, 2014

GRC Complaint Received: October 2, 2014

Background³

Request and Response:

On September 8, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On September 19, 2014, one (1) business day after receipt, the Custodian responded in writing, denying the request pursuant to N.J.S.A. 47:1A-9(b). The Custodian further stated that he could neither confirm or deny the existence of responsive records, stating that providing a definitive response would reveal the identities of individuals on the “authorized list,” thus violating the confidentiality requirement inherent in N.J.A.C. 10A:18-2.6(h). According to the Custodian, revealing such information “could be used as intelligence to thwart security measures.”

Denial of Access Complaint:

On October 3, 2014, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Government Records Council (“GRC”). The Complainant argued that disclosure of whether or not he is on the list is irrelevant, claiming that he is already aware he is on the confidential list. Additionally, the Complainant provided Inmate Remedy System Forms as evidence to show he is on the list described under N.J.A.C. 10A:18-2.6(h). Moreover, the Complainant stated that he is seeking neither the confidential list itself nor copies of the correspondence

Statement of Information

On October 20, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he contacted the Special Investigations Division (“SID”) at New Jersey State Prison (“NJSP”) in his search for responsive records. In response, a representative from SID stated that confirming or denying the existence of responsive records would jeopardize the safety and security of the facility.

The Custodian stated that OPRA cannot “abrogate or erode any . . . grant of confidentiality established by . . . statute . . . which may duly be claimed to restrict public access to a public records or government records.” N.J.S.A. 47:1A-9(b).

N.J.A.C. 10A:18-2.6(h), referenced by the Complainant states that “[a] confidential list of names of inmates whose incoming correspondence is authorized to be read shall be established and maintained [] where the confidentiality of the list can be maintained.” The Custodian stated that the list is of inmates whose mail is subject to additional scrutiny to thwart illicit activities committed inside and outside the prison. The Custodian argued that providing the Complainant with any response whatsoever, either denying access or to state that no records exist, would violate the principle behind N.J.A.C. 10A:18-2.6(h).

The Custodian claimed that, if he were to respond by denying access to responsive records, it would let the Complainant know that he is on the confidential list. In the alternative, if the Custodian were to respond that no responsive records exist, it would likewise allow the inmate to infer that he is not on that confidential list. In either situation, the Custodian argued that the Complainant could use the knowledge to circumvent SID’s intelligence gathering and hinder its ability to maintain a safe and secure facility. Additionally, the Custodian asserted that N.J.A.C. 10A:22-2.3(a)(5) also prohibits release of redacted records, as disclosure would “jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement.” The Custodian stated that mere knowledge of whether an inmate is or is not on the list would run afoul of the stated obligations under N.J.A.C. 10A:22-2.3(a)(5).

Additionally, the Custodian countered the Complainant’s claim that he is already aware that he is on the confidential list as referenced under N.J.A.C. 10A:18-2.6(h). The Custodian argued that the Complainant’s evidence only reveals that his correspondence may be subject to scrutiny but does not specify the level of scrutiny applied. Furthermore, the Complainant’s evidence does not state whether he is subject to the level of scrutiny reserved for those inmates named in the confidential list under N.J.A.C. 10A:18-2.6(h).

The Custodian argued that the Courts have long deferred to DOC when making safety and security decisions. The Custodian states that DOC has “broad discretionary power” to promulgate regulations aimed at maintaining security and order inside correctional facilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). The Custodian stated that the Courts have noted, “[p]risons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment.” Russo v. N.J. Dep’t of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). *See also* Florence v. Bd. of Chosen Freeholders Burlington Cnty., 132 S.Ct. 1510, 1515 (2012) (“[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face[.]”).

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Macchiaverna v. NJ Dep’t of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015), the custodian certified that she could not confirm or deny the existence of responsive records to the complainant’s OPRA request. The custodian therefore refused to complete Item No. 9 of the SOI, which requires a document index. Because there was inadequate evidence to adjudicate the matter, the Council referred the complaint to the Office of Administrative Law (“OAL”) to resolve the facts.

In the current matter, the Custodian certified that he could neither confirm nor deny the existence of responsive records, claiming that doing so would violate the Custodian’s confidentiality obligations under N.J.A.C. 10A:18-2.6(h) and N.J.A.C. 10A:22-2.3(a)(5). Similar to Macchiaverna, the Custodian here refused to complete Item No. 9 of the SOI, which requires a document index. Thus, the GRC does not have a complete record to adjudicate the complaint. Id.

Therefore, based on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. Therefore, this complaint should be referred to the OAL for a hearing to resolve the facts. This complaint should also be referred to the OAL for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna, GRC No. 2014-324.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based on the insufficient evidence in this matter, the GRC is unable to determine whether the Custodian

unlawfully denied access to the requested records. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. The complaint should also be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. Macchiaverna v. NJ Dep't of Banking & Insurance, GRC Complaint No. 2014-324 (Interim Order dated June 30, 2015).

Prepared By: Samuel A. Rosado
Staff Attorney

March 22, 2016